Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term 1995

LENNON ANDERSON,

Petitioner,

vs.

ENVIROTEST TECHNOLOGIES, Inc.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LENNON ANDERSON, Pro se
P.O. Box 4235
Ft. Lauderdale, FL 33338-4235
954/849-0528

36 pp

QUESTIONS PRESENTED

1. Where both parties submitted documentation to be reviewed by the U.S. District Court for the Southern District of Florida, were the facts in this instant case viewed in the light most favorable to the Petitioner, the non-movant?

2. Where both parties submitted documentation to be reviewed by the U.S. District Court for the Southern District of Florida, did the affidavits from the Petitioner create genuine issues of material facts to preclude summary judgment?

3. In light of the ruling from the U.S. Court of Appeals for the Eleventh Circuit on Howard v. B.P. Oil Company, 32 F.3d 520 (11th Cir. 1994) in which summary judgment was reversed due to inconsistencies in the defendant's statements, is the affirmation of summary judgment in this instant case justified with Respondent's inconsistent statements?

LIST OF PARTIES

Lennon Anderson
Envirotest Technologies, Inc.
Envirotest Systems Corporation (Parent Company of Envirotest Technologies)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lennon Anderson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported opinions and order of the Court of Appeals are reproduced in the appendix filed herewith ("App.") at 1a, 2a, and 3a. The unreported opinion and orders of the district court in this case are reproduced at 5a, and 7a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 18, 1996. The Petition for rehearing was denied on June 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The pertinent provisions of Section 1981 of 42 U.S.C. and Title VII of the Civil Rights Act of 1964 are set forth below:

Section 1981. Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 703(a) of Title VII:

(a) Employer Practices

> It shall be an unlawful employment practice for an employer--
>
> (1) to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h) of Title VII:

(h) not withstanding any other provision of the title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The Petitioner was racially discriminated against by Envirotest Technologies, Inc. (formerly Systems Control). The discrimination began when the Petitioner was hired by the Respondent, including being by-passed for three promotional opportunities. During the employment period, the Respondent had its name changed from Systems Control without creating a new entity on May 27, 1992.

On December 3, 1990, the Petitioner (black, electrical engineer) was hired by the Respondent at a starting salary of $8.50/hr to perform the duties of an equipment technician. Haddy Martinez (hispanic, technician), Mark Keith (white, technician) and Ralph Pera (hispanic, technician) were also hired approximately the same time as the Petitioner to perform the same duties of an equipment technician. Martinez' starting salary was $9.93/hr. The exact starting salary of Mark Keith and Ralph Pera are unknown, but they were more than $8.50/hr. At the time of hiring, the Respondent was erecting buildings in Dade and Palm Beach Counties in preparation to begin testing the public on April 1, 1991 as a contractor for the State of Florida in the Motor Vehicle Inspection Program (MVIP).

In March 1991, Bill Hall, a Facilities Technician from Systems Control, Illinois Program, was promoted to Senior Equipment Technician for Palm Beach County. They were no job postings for this position.

Prior to April 1,1991, the Petitioner and his coworkers worked in both counties (Dade and Palm Beach) installing equipment and performing diagnostic checks on emission computer systems. On April 1, 1991, the equipment technicians

worked in the county they were originally hired to work in. Bill Hall and the Petitioner reported to Palm Beach County, while the other equipment technicians reported to Dade County. Due to Bill Hall's lack of knowledge and experience in electronics, the Petitioner essentially had the entire burden of maintaining the equipment in Palm Beach County.

In July 1991, Mark Keith was promoted to Senior Equipment Technician for Dade County, which the Petitioner applied for, but withdrew. Also, Steve Smith (white, technician) was hired to perform the duties of an equipment technician at a starting salary of $9.93/hr, which is the same starting salary as Martinez.

In January 1992, Haddy Martinez was promoted to Technical Support Manager. When all the applicants applied, the position was called Systems Support Manager. Martinez, however, was not qualified for the position because he lacked prior supervisory experience, a prerequisite for the position, which the Petitioner possessed. This kind of departure from established company policy by the Respondent was also done in the promotion of Mark Keith and Bill Hall. Furthermore, the job posting for Technical Support Manager was not posted in Palm Beach County until the Petitioner inquired about the position.

After the promotion of Haddy Martinez, the Petitioner informed the Respondent on January 14, 1992 that the year 1992 would be his last year with the company. On October 31, 1992, the Petitioner resigned, declaring that his engineering skills were neither valued nor nurtured by upper level management. Employment at the administrative/professional level was accepted with the State of Florida where the Petitioner's engineering skills are valued.

On April 5, 1994, the Petitioner brought action against the Respondent, claiming breach of employment contract, racial discrimination under Section 1981 of Title 42 and breach of the MVIP contract.

In the district court, the case was referenced to a U.S. Magistrate. The Respondent moved for summary judgment and the U.S. Magistrate recommended to the district judge that the motion be granted. The magistrate made findings in his report that were not supported by the record. In other words, the magistrate's report had false and erroneous information. Nonetheless, the district judge adopted the recommendation and granted the motion for summary judgment.

On appeal, the U.S. Court of Appeals for the 11th Circuit affirmed summary judgment based upon the reasons given in the U.S. Magistrate's "Report and Recommendation". A petition was filed for rehearing, but it was denied on June 27, 1996.

REASON FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit court of appeals on three important questions concerning summary judgment. In Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), this Court held that the facts relied on by the movant must be viewed in the light most favorable to the non-moving party so that any doubt as to the existence of a genuine issue of material fact would be resolved in favor of denying the motion. This guidance is being followed by the federal court of appeals, but when applied to this instant case, the decision of the U.S. Court of Appeals for the Eleventh Circuit makes no logical sense.

In reviewing several summary judgment cases before the federal court of appeals, information which created doubt on the movant resulted in reversal of summary judgment. For example, summary judgment was reversed in Howard v. B.P. Oil Co., Inc., 32 F.3d 520 (11th Cir. 1994) because of inconsistencies in the defendant's statements. Summary judgment was also reversed in Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913 (11th Cir 1993). In Hairston, 9 F.3d at 914, the court held,

> "genuine issues of material fact as to whether employer's stated reason for adverse employment action were mere pretext for discrimination precluded summary judgment in favor of the employer."

Moreover, in Liotta v. National Forge Company, 629 F.2d 903, 907 (3rd Cir. 1980), summary judgment was also reversed. The court held, "our review of this document leads us to conclude that genuine issues of material fact are raised by Liotta's specific allegations." The cases mentioned above all conform to the guidance set forth in Adickes.

The decision, however, by the U.S. Court of Appeals for the 11th Circuit in this instant case has strayed from this Court's holding in Adickes and precedents in other federal circuit court of appeals, including the 11th circuit. In essence, this ruling has created a "safe harbor" to allow employers to continue with racial discriminatory practices. This result cannot stand.

I.

WHERE BOTH PARTIES SUBMITTED DOCUMENTATION TO BE REVIEWED BY THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, THE FACTS IN THIS INSTANT CASE WERE NOT VIEWED IN THE LIGHT MOST FAVORABLE TO THE PETITIONER, THE NON-MOVANT.

The lower courts have wholeheartedly accepted the magistrate's report and recommendation. While in the district court, the Petitioner presented 164 documentary exhibits in support of his case. The Respondent, on the other hand, only presented 5 documentary exhibits: 1. Petitioner's deposition; 2. John Barbarino's affidavit; 3. Bill Hall's affidavit; 4. Mark Keith's affidavit; and 5. Haddy Martinez' affidavit.

On page 1 of the magistrate's report, he stated that the facts are viewed in the light most favorable to the Petitioner the non-movant (see R3-76-1). The Petitioner disagrees because the magistrate omitted from his report several important facts that are imperative to the Petitioner's case; he also made findings not supported by the record.

Initially, the magistrate did not discuss the difference in payrates among the equipment technicians, where the Petitioner, the only black, was being paid less than his coworkers to do the same work. The record shows that Haddy Martinez' and Steve Smith's starting salary were identical, $9.93/hr (see R3-68-E148-2 and R3-68-E149-2)[1]. Furthermore, Smith was hired seven months after the Petitioner. This difference in payrate is a material issue (see Pittman v. Hattiesburg Mun. Separate Sch. Dist, 644 F.2d 1071, 1074 (5th Cir. 1981)). The

court in Pittman used starting payrates in its analysis to determine that Pittman was racially discriminated against. The same analysis used in Pittman is also applicable to this instant case. To establish a prima facie case of racial discrimination with respect to compensation, the Petitioner must show that he was paid less than a member of a different race for work requiring substantially the same responsibility. See Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978). This criteria has been met.

The Respondent has failed to provide a legitimate, non-discriminatory reason for the difference in payrates, to justify its actions under Section 703(h) of Title VII[2]. The difference in payrates is not based on experience or seniority.

To address experience, before being hired by the Respondent, Haddy Martinez had 2.67 years of electronic experience (see R3-68-E148-2 and R2-44-E121-1). Steve Smith had 19 years of electronic experience (see R3-68-E150-1), and the Petitioner had 3.63 years of electronic experience (see Appellant's Brief at 9). Clearly, experience cannot be the basis for the difference in payrates, because with Smith's 19 years of electronic experience, he was paid the same starting salary as Martinez who had only 2.67 years of electronic experience.

To address seniority, the Petitioner was hired on December 3, 1990, Martinez on December 5, 1990, and Smith on July 9, 1991. These dates show that the Petitioner had 2 days seniority over Martinez (see R3-68-E148-1), and 7 months seniority over Smith (see R3-68-E149-1). Clearly, seniority cannot be the basis for the difference in payrates, because the Petitioner was hired before Martinez and Smith. Nonetheless, the Petitioner was paid less to do the same work.

Furthermore, when Martinez applied for the position of Systems Support Manager, his current salary was $10.40/hr (see R3-68-148-1), while the Petitioner was $8.52/hr (see R1-10-E19-1). The Respondent gave no explanation why Martinez, who received the same performance rating as the Petitioner, exceeded job requirements (see R1-28-E41-3), was given an increase of 47 cents, while the Petitioner was given an increase of only 2 cents. See Calcote, 578 F.2d at 97. Since there is no justification for the difference in payrates, Section 703(a)(1) of Title VII[3] has been violated. The material issue is whether or not the difference in payrates was racial.

Secondly, the magistrate did not report that Haddy Martinez lacked prior supervisory experience, a prerequisite for the position; instead, the magistrate reported that other candidates, including Martinez possessed managerial/interpersonal skills (see R3-76-6). However, a careful examination of the record shows that Martinez did not have prior supervisory experience (see R3-68-E148-2), while the Petitioner did (see R1-10-E4-1 and R1-10-E19-2). Furthermore, the Respondent has conceded to the fact that Martinez did not have prior supervisory experience (see R3-81-9); instead, the Respondent argued that Martinez had managerial potential. Managerial potential, however, is not synonymous to prior supervisory experience. By the magistrate's failure to report these issues, the lower courts have strayed from this Court's holding that a criterion is to be applied in like manner to members of all races (see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)). It is improper for the Respondent to not promote the Petitioner claiming "lack of prior supervisory experience", then promote someone else not in the Petitioner's protected group who does not have prior supervisory experience. This is a double standard on the Respondent's part.

The magistrate's report emphasized that the petitioner had communication problems (see R3-76-8). The report, however, did not mention that the Petitioner had only one incident of a communication problem on file in his personnel folder. In regards to the problem, the record shows that Steve Smith apologized and accepted the communication problem as his fault (see R1-10-E21-1). Smith said,

> "So, Mr. Lennon I offer to you a full and complete apology from me for my temper, attitude, actions and complete lack of professionalism. I also offer my promise that it will not happen again."

Logically, if the Petitioner's communications skills were at the remedial level, then his folder would have been filled with numerous documentations about his communication skills on different issues, not just one. Furthermore, the record shows that the Petitioner adamantly denied at his deposition having communications or interpersonal problems with his coworkers (see Petitioner's Depo. at 59). The Petitioner stated,

> "The problems that I have had with coworkers, again, are not communication problems or interpersonal problems. It is reporting to management what other employees have been doing when they were not supposed to be doing it."

In fact, the record shows that it was the Respondent who had communication problems.

Specifically, R1-27-E48-1 and R1-27-E49-1 show requests to Mark Keith and Haddy Martinez to communicate with the Petitioner on equipment modifications. Moreover, R1-27-E52-1 shows an equipment modification from California to Florida, dated October 22, 1991. Stan Krzywicki was in Florida when this modification was released; however, the Petitioner was not informed about it until January 20, 1992, three months later. None of these facts were mentioned in the magistrate's report.

Also, the magistrate made a false finding that the Respondent offered the Petitioner the opportunity to take a communication course before the promotion of Haddy Martinez (see R3-76-7). The record, however, shows that the offer was made after the promotion of Martinez. To illustrate, Martinez was promoted on January 8, 1992 (see R2-44-E125-1). In fact, the Petitioner testified at his deposition that John Barbarino and Kim Johnson, Human Resource Manager, made an offer for the Petitioner to take a people-skills course (see Petitioner's Depo. at 52). Kim Johnson made her offer at a meeting held on January 24, 1992 (see R2-44-E86-3). John Barbarino made his offer at a meeting held on January 30, 1992 (see R2-44-E95-1). These meetings were held because of Petitioner's memo, dated January 14, 1992, regarding Martinez' promotion (see R1-10-E24-2). This same memo was placed in Petitioner's personnel folder (see R2-44-E86-2). Kim Johnson noted at the bottom, "talk to John before doing anything." The sequence of events show that the offers to take communication skills course were made after the promotion of Haddy Martinez, possibly to mask an illegal motive, such as racial discrimination.

Moreover, the Petitioner established a prima facie case for the promotion given to Haddy Martinez (see Appellant's Brief at 7-11). To establish a prima facie case of discrimination in a failure to promote case, the Petitioner must prove that:

> 1) he is a member of a protected minority; 2) was qualified for and applied for a promotion for which the employer was seeking applicants; 3) was rejected despite these qualifications; and 4) that the position remained open or was filled by a person outside the protected group.

Redd v. City of Phoenix, 934 F.2d 1211, 1216 (11th Cir. 1991).

For prima facie criterion 1, the Petitioner is a member of

the black race; thus, prima facie criterion 1 was met.

For prima facie criterion 2, the Petitioner applied for the position and was qualified (see R1-10-E19-1). The Petitioner need not prove any qualifications other than the objective qualifications. See Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344-45, 26 FEP 1391, 1395-96 (9th Cir. 1981). The Respondent required four objective criteria in order to be qualified for the position of Systems Support Manager (see R1-10-E17-1):

> (i) Technical Degree desirable; (ii) 3-5 years experience as an instrument or electronic technician; (iii) Familiar with calibration procedures and feasibility of standards using NBS procedures; (iv) Prior supervisory experience.

For job criterion (i), the Petitioner's electrical engineering degree satisfies this criterion (see R1-10-E6-1).

For job criterion (ii), the Petitioner had 7 years of experience as an electronic technician before employment with the Respondent, which is equivalent to 3.63 years of full-time experience. In addition, the Petitioner accumulated another year of full-time electronic experience when the decision was made to promote Haddy Martinez. This criterion did not specify full-time or part-time. Overall, the Petitioner had 4.63 years of full-time electronic experience. Therefore, job criterion (ii) was met.

For job criterion (iii), the Petitioner's electrical engineering degree from the University of South Florida (USF) covers this criterion. Therefore, job criterion (iii) was met.

For job criterion (iv), this criterion was met because of

Petitioner's job at Amerada Hess Corporation and Lakes Electronics in which he supervised staff with training on how to promote customer relations (see R1-10-E4-1). In addition, he supervised the training of engineering students in thermodynamics at USF. Therefore, prima facie criterion 2 was met.

For prima facie criterion 3, the Petitioner was rejected (see R1-10-E19-2); thus, prima facie criterion 3 was met

For prima facie criterion 4, Haddy Martinez, who was not in Petitioner's protected group, was selected for the position; thus, prima facie criterion 4 was met.

A prima facie case could not be established for the promotions given to Mark Keith and Bill Hall. However, the treatment given to the Petitioner by the Respondent during the promotions of Hall and Keith can be used in the discussion of the established prima facie case, and to show that the facts were not viewed in the light most favorable to the Petitioner (see McDonnell Douglas Corp, 411 U.S. at 804-805). This Court held that factors that determine discriminatory motive/intent include departure from normal procedures and history of discriminatory actions.

The magistrate's report did not mention that the job posting for Senior Equipment Technician which was given to Mark Keith was posted only in one location in Palm Beach County, Brenda's office (see R1-10-E12-1). Normally, job postings are placed on the bulletin boards at each station (see R1-10-E13-1) to give every employee the opportunity to apply. For some reason, the Respondent requested that the job-posting be posted only at a non-station location, knowing that the Petitioner spends the majority of his time at the stations repairing equipment, he would not see the job posting. This

action is improper under Section 703(a)(2) of Title VII[4]. Also, the magistrate cited to Mark Keith's affidavit that Martinez is the best technician (see R3-76-8), but failed to mention that the Petitioner was able to resolve problems that no other technician could resolve, including Keith and Martinez (see R3-82-E163-1 and R3-82-E164-1). Furthermore, the magistrate used the act of withdrawing from the position given to Mark Keith against the Petitioner, but failed to mention that Keith withdrew from the position given to Martinez (see R3-76-9).

Additionally, John Barbarino mentioned that Bill Hall's position required 3 years of electronic experience and supervisory experience was desirable (see Barbarino's Aff. para. 11). A careful examination of the record shows that Hall's supervisory experience was teaching, with zero years of electronic experience (see R3-63-E139-1). Nonetheless, the Petitioner's teaching experience was not considered as supervisory (see Barbarino's Aff. Para 20). Furthermore, the magistrate made a finding that Hall's position is exclusively managerial, and required no electronic background (see R3-76-7). This finding by the magistrate is squarely contrary to John Barbarino's statement above requiring 3 years of electronic experience. The record confirms that Hall's position dealt with electronics, and he was not qualified for the position of Senior Equipment Technician since the Respondent offered to train him after he got the promotion (see R1-10-E10-1).

Furthermore, from the 164 exhibits presented by the Petitioner, the magistrate only mentioned R2-38-E58-1: a Christmas card from Peter Stubenvoll to the Petitioner which personally stated, "Hope we haven't shocked you with some of our strangeness!" Here, Stubenvoll, Palm Beach County Regional Manager, who was second in command in Florida's Program is admitting that he and others had committed some acts in which he considered strange and hoped that the acts did

not shock the Petitioner. The Magistrate, however, decided that the statement by Stubenvoll is too attenuated to present a genuine issue of material fact to the Respondent's discriminatory intent (R3-76-11). The Petitioner disagrees, because when this statement is viewed in the light of how the Respondent treated the Petitioner, there is a genuine issue of material fact.

Some of the Respondent's strange acts included: (i) keeping Bill Hall in a position in which he was not qualified for (see R1-10-E10-1); thus, barring the Petitioner from career development; (ii) requesting job posting for Senior Equipment Technician to be posted only in Brenda's office (see R1-10-E12-1); (iii) not placing R1-28-E38-1, R2-44-E88-1 through R2-44-E117-1 in Petitioner's personnel's folder for his review. These exhibits were all dated before February 14, 1992, with fax transmission reports indicating that the Respondent received them. Nonetheless, when the Petitioner requested to see his folder, R1-28-E38-1, R2-44-E88-1 through R2-44-E117-1 were not shown, although Kim Johnson and Peter Stubenvoll signed Petitioner's agreement that what was shown to the Petitioner included everything (see R1-28-E39-1). (iv) posting the position of Systems Support Manager in Dade County only, until the Petitioner inquired about it. (v) paying Petitioner a lower starting salary than Smith and Martinez for doing the same work.

The facts mentioned above show that the magistrate's report did not view the facts of this instant case in the light most favorable to the Petitioner. At best, the facts appear to have been viewed in the light most favorable to the Respondent, which is flatly contrary to Adickes. Put it another way, the magistrate's report was not an impartial report. For example, the magistrate compares the degrees of Haddy Martinez and the Petitioner on a similar scale (see R3-76-9), knowing Martinez' degree was obtained from ITT Technical Institute which

qualifies him as a technician, while the Petitioner's degree was obtained from the University of South Florida which qualifies him as an engineer. To compare both degrees on a similar scale is like comparing the degree of a lawyer to that of a paralegal. A lawyer and a paralegal are not equals, although they are both in the area of law. Likewise, the Petitioner's and Martinez' degrees are not equal. These actions by the magistrate in this instant case are similar to the magistrate in Pittman. The appeals court in Pittman held, "Rather than deal with the difficult fact issue, the magistrate avoided it by finding that defendant articulated a legitimate, non-discriminatory reason in rebuttal of any prima facie case." The appeals court in this instant case has strayed from the appeals court decision in Pittman, which is to reverse judgment if the facts were not viewed in the light most favorable to the non-movant.

II.

WHERE BOTH PARTIES SUBMITTED DOCUMENTATION TO BE REVIEWED BY THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, THE AFFIDAVITS FROM THE PETITIONER DID CREATE GENUINE ISSUES OF MATERIAL FACTS TO PRECLUDE SUMMARY JUDGMENT.

The movant has the initial burden of establishing the absence of a genuine issue of material fact. Celotex Corp v. Catrell, 477 U.S. 317, 323 (1986). This burden has not been met by the Respondent, because there are genuine questions as to whether the Respondent's reasons for promoting others not in the Petitioner's protected group were intentional discrimination

Furthermore, the Respondent unsuccessfully tried to have all 164 exhibits for the Petitioner stricken from the record. The Respondent argued that the Petitioner's affidavits were conclusory and not based on personal knowledge (see R3-66-1 and R3-70-1). This is similar to the defendant's argument in Liotta v. National Forge Co., 629 F.2d 903, 907-908 (3rd Cir. 1980). The district court in Liotta granted summary judgment, as in this instant case, on the grounds that no genuine issue was presented. The appeals court in Liotta, however, reversed summary judgment holding that the affidavit had genuine issues of material fact.

The appeals court in this instant case has strayed from the appeals court's decision in Liotta. It makes no sense for the district court to deny Respondent's motion to strike Petitioner's affidavits from the record, which contain genuine issues (see Order at 5a), then grant Respondent's motion for summary judgment on the grounds that there is no genuine issue.

III.

IN LIGHT OF THE RULING FROM THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON HOWARD V. BP OIL IN WHICH SUMMARY JUDGMENT WAS REVERSED DUE TO INCONSISTENCIES IN THE DEFENDANT'S STATEMENTS, THE AFFIRMATION OF SUMMARY JUDGMENT IN THIS INSTANT CASE IS NOT JUSTIFIED WITH RESPONDENT'S INCONSISTENT STATEMENTS.

The Respondent's inconsistent statements began in its Answer to the Petitioner's Complaint. Under the Second Defense of the Answer, the Respondent specifically admitted to discriminating against the Petitioner. Admission was made to numbers 1 and 4 of the Complaint. Number 4 of the Complaint states, "Defendant breached employment contract, due to intentional racial discrimination, which barred Plaintiff from opportunities for career development." However, under the Sixth Defense, the Respondent stated that it has not willfully or intentionally violated Section 1981 of Title 42 and has not committed any unlawful employment practice. The Second and the Sixth Defense are not consistent based upon the record.

In regards to the prima facie case established for the promotion of Haddy Martinez, the General Manager, John Barbarino, testified that the Petitioner was not qualified for the position of Systems Support Manager for the following four reasons: 1) numerous problems with coworkers; 2) lack of supervisory management experience; 3) position not in Petitioner's career path; and 4) lack interpersonal skills.

However, according to the hiring manager, Stan

Krzywicki, the Petitioner was not qualified for the following three reasons (see R1-10-E19-2): 1) Petitioner had communication difficulties with coworkers; 2) Petitioner did not have managerial skills; 3) this job is not in Petitioner's career goals.

There is an inconsistency here, because the General Manager stated four reasons and the hiring manager stated three reasons why the Petitioner was not promoted.

Reasons 1 and 4 of the General Manager, including reason 1 of the hiring manager are contradicted by the information contained in a letter from the CEO and statements made by John Barbarino. The CEO stated, "Your work on this project is greatly appreciated and was unquestionably a major factor in the successful implementation of the Florida Program." (see R1-28-E38-1). Logically, if the Petitioner was not able to work with his coworkers, or had communication problems with his coworkers, then he would not have been awarded this $1500.00 bonus. It is not logical to reward someone with money for doing a poor job. Furthermore, John Barbarino stated that the Petitioner is a good worker and deserves to move up (see R1-10-E30-1), in addition to being a knowledgeable and capable graduate engineer (see R1-10-E31-1). These statements by John Barbarino are not consistent with his reasons for not promoting the Petitioner.

Reason 2 from the General Manager and the hiring manger are not consistent with the record. The record shows that the Petitioner has supervisory experience which involved teaching engineering students. Teaching is supervisory (see Leisner v. New York Telephone Company, 358 F. Supp. 359, 368- 369 (S.D. NY, 1973). In Leisner, New York Telephone Company did not consider teaching as supervisory experience. However, the court disagreed. In fact, the Respondent

considered Bill Hall's teaching of navy students as supervisory experience, but not the Petitioner's teaching of engineering students. To considered Hall's teaching as supervisory and not the Petitioner's is flatly contrary to this Court's holding in McDonnell Douglas Corporation that a criterion is to be applied in like manner to members of all races. If Bill Hall's teaching is considered as supervisory, then the Petitioner's teaching experience is also supervisory.

Also, reason 3 from the General Manager and the hiring manager is not consistent with the record. Specifically, the qualifications on the job posting for Systems Support Manager did not require that the Petitioner have the position in his career path or career goals (see R1-10-E17-1). In fact, no position was ever posted by the Respondent requiring the applicant to have the position being sought to be in his/her career path or goals (see R2-38-E62-1 through R2-38-E72-1).

Furthermore, John Barbarino testified that the Petitioner was given a special privilege to apply for the position of Systems Support Manager (see Barbarino's Aff. para. 16). This statement is inconsistent with the record. The record shows that several applications were received before the October 24 deadline (see R2-44-E122-1). However, a careful examination of Steve Smith's application shows that his was received by personnel on October 31, 1991, seven days after October 24, the closing date (see R3-68-E149-1). Although Smith's application was late, he was still considered for the position (see R2-44-E122-2). So then, it was a white applicant, Steve Smith, that received a special privilege and not the Petitioner.

John Barbarino also testified that he had the final authority to decide upon all promotions (see Barbarino's Aff. para.1). This statement, however, is inconsistent with a document showing Barbarino's superiors giving their approval

on the promotion of Martinez (see R2-44-E123-1). Clearly, Barbarino was not the ultimate decision maker, because if his superiors did not agree, then Martinez would not have been promoted.

With all three promotions, the Respondent was not consistent with the company's policy statement regarding promotions. The Vice President of the company stated, "All employment decisions are based solely upon an individual's qualifications for the position being filled to further the principle of equal opportunity employment" (see R1-10-E23-1). For instance, this policy was not consistent with the promotion of Haddy Martinez because he did not have prior supervisory experience. Moreover, for the lower courts to allow the Respondent to promote against an established company policy and promotion criteria, the lower courts have effectively strayed from other appeal court rulings on this material issue (see Harris v. Richards Mfg. Co., 511 F. Supp. 1193, 1204-04, 25 FEP 720, &28-29 (W.D. Tenn. 1981), quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 25 FED 113, 116 (1981) ("articulated reasons for transfer inconsistent with established policy; defendant's proffered reason 'unworthy of credence'"). In this instance case, the Respondent's articulated reasons for not promoting the Petitioner are unworthy of credence. See Lindsey v. Angelica Corp., 508 F.Supp. 363, 366, 25 FEP 402, 404 (E.D. Mo. 1981) (Pretext shown by demonstrating that employer acted contrary to its own policy; experience black job applicant rejected despite qualification for assistant manager's position). See Predmore v. Allen, 407, F.Supp. 1067, 16 FEP 1175 (D.Md.1975) (Court relied on fact that national security agency disregarded its own promotion criteria). See also Lee v. Conecuh County Board of Education, 634 F.2d 959, 26 FEP 1251 (5th Cir. 1981). Based upon Harris, Lindsey, Predmore, and Lee, it is not the Court's function to determine who is most qualified for a promotion;

however, it is the Court's function to determine if the employer abided by its policies and promotion criteria. Clearly, the Respondent in this instant case disregarded its own policy and promotion criteria and the lower courts have done nothing about it.

The facts mentioned in this section showing Respondent's inconsistencies and contradictions were not mentioned by the magistrate or the district judge who stated that his court reviewed the entire file and record (see Order at 7a). These inconsistencies, in addition to Peter Stubenvoll's statement (Hope we haven't shocked you with some of our strangeness!) would enable a reasonable jury to find that the Respondent, in fact, did intentionally discriminate racially against the Petitioner. Identification of inconsistencies in the Respondent's statements is evidence of pretext (see Howard, 32 F.3d at 526 citing Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255 (1981)). The granting of summary judgment in this instant case by the district judge and the affirmation by the appeals court is flatly contrary to precedents set by this Court, including the Appeals Court of the 11th Circuit. It is imperative to note that the Honorable Judge Birch and the Honorable Judge Moreno were on the panel that ruled that Howard be reversed and remanded due to inconsistencies. are the same judges in this instant case. The affirmation of summary judgment by the panel in this instant case is in direct conflict with the binding precedent of Howard.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Lennon Anderson, Pro se
P.O. Box 4235
Ft. Lauderdale, Fl 33338-4235
954/849-0528

FOOTNOTES

[1]The required record referencing method was modified by inserting an "E" followed by a number to reflect exhibits; e.g., R2-38-E83-1 indicates record reference volume 2, document 38, exhibit 83, page 1.

[2]The same analysis applies to claims brought under U.S.C. Section 1981 as to claims brought under Title VII. See e.g., Palmer v. Dist. Bd. of Trustees of St. Petersburg Junior College, 748 F.2d 595, 596 n.2 (11th Cir. 1985).

[3]Id. at 596

[4]Id. at 596

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 18, 1996

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-4760
Non-Argument Calendar

LENNON ANDERSON,
APPELLANT,

v.

ENVIROTEST TECHNOLOGIES, INC.,
DEFENDANT.

Appeal from the United States District Court for the Southern District of Florida
(94-858-CV-FAM)

PER CURIAM:

Lennon Anderson appeals from order of the district court granting summary judgment to the defendants in appellant's action against his employer alleging race discrimination pursuant to Section 1981 of 42 U.S.C.

We affirm for the reasons given by the magistrate judge in his report and recommendation dated April 25, 1995, and approved and adopted by the district court June 5, 1995.

AFFIRMED.

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 27, 1996

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-4760
Non-Argument Calendar

LENNON ANDERSON,
APPELLANT,

v.

ENVIROTEST TECHNOLOGIES, INC.,
DEFENDANT.

Appeal from the United States District Court for the Southern District of Florida
(94-858-CV-FAM)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

BEFORE: KRAVITCH, ANDERSON AND BIRCH, Circuit Judges

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedures; Eleventh Circuit Rule 35-5, the Suggestion(s) of Rehearing En Banc are DENIED.

APPENDIX C - MEMORANDUM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ISSUED MANDATE ON JULY 15, 1996

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-4760
Non-Argument Calendar

LENNON ANDERSON,
APPELLANT,

v.

ENVIROTEST TECHNOLOGIES, INC.,
DEFENDANT.

Appeal from the United States District Court for the Southern District of Florida
(94-858-CV-FAM)

BEFORE: KRAVITCH, ANDERSON AND BIRCH, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern district of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the

said District Court appealed from in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the cost on appeal to be taxed by the Clerk of this Court.

ISSUES AS MANDATE: 07/15/96

APPENDIX D - MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED APRIL 23, 1995

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 94-858-CIV-MORENO
MAGISTRATE JUDGE GARBER

LENNON ANDERSON,
PLAINTIFF,

v.

ENVIROTEST TECHNOLOGIES, INC.,
DEFENDANT.

OMNIBUS ORDER

THIS CAUSE is before the Court on two motions by Defendant to strike various affidavits filed by Plaintiff in response to defendant's motion for summary judgment (D.E. 66, 70); and a motion by Plaintiff to withdraw affidavit regarding the admittance of Edmund J. McKenna (D.E. 50). After careful consideration, it is hereby

ORDERED as follows:

1) Plaintiff's Motion is GRANTED;

2) Defendant's Motions are DENIED. The undersigned has considered the affidavits at issue and has afforded them appropriate consideration.

DONE AND ORDERED at the United States Courthouse, Miami, Florida this 25th day of April.

BARRY L GARBER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
U.S. District Judge Moreno
Counsel of record

APPENDIX E - MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED JUNE 6, 1995

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 94-858-CIV-MORENO

LENNON ANDERSON,
PLAINTIFF,

v.

ENVIROTEST TECHNOLOGIES, INC.,
DEFENDANT.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THE MATTER was referred to the Honorable Barry L. Garber, United States Magistrate Judge, for a Report and Recommendation on Defendant's Motion for Summary Judgment (docket no. 54), filed on January 13, 1995. The Magistrate Judge filed a Report and Recommendation on April 25, 1995, and recommended that Defendant's Motion for Summary Judgment be GRANTED. On April 28, 1995, the Court issued an Order setting the matter for oral argument. Plaintiff filed its Objections to the Report and Recommendation on May 5, 1995.

The Court has reviewed the entire file and record. The Court

has made a de novo review of the issues that Plaintiff's Objections to the Magistrate Judge's Report and Recommendation present and has heard oral argument of June 1, 1995. It is

ADJUDGED the United States Magistrate Judge Barry L. Garber's Report and Recommendation, filed on April 25, 1995, is ADOPTED AND RATIFIED in its entirety. Plaintiff has failed to proffer in his pleading and at oral argument any evidence that Defendant's decisions to promote William Hall and Haddy Martinez, rather that Plaintiff, were racially motivated. See Howard v. BP Oil Co., Inc., 32 F.3d 520 (11th Cir. 1994). Moreover, Plaintiff's claims for relief under the alleged employment contract and the Motor Vehicles Inspection Program Contract entered into between Defendant and the State of Florida also fail for the reasons stated in pages 11 and 12 of Judge Garber's Report and Recommendation. Therefore, it is

ADJUDGED that Defendant's Motion for Summary Judgment (docket no. 54) is GRANTED.

DONE AND ORDERED in open court at Miami, Florida, this 1st day of June, 1995, and signed the 5th day of June, 1995.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE